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1 P R O C E E D I N G S

2 (11:06 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear  
4 argument next in Case 13-534, North Carolina State Board  
5 of Dental Examiners v. The Federal Trade Commission.

6 Mr. Mooppan.

7 ORAL ARGUMENT OF HASHIM M. MOOPPAN

8 ON BEHALF OF PETITIONER

9 MR. MOOPPAN: Mr. Chief Justice, and may it  
10 please the Court:

11 A State regulatory agency does not lose its  
12 State action antitrust immunity simply because the  
13 agency is run by part-time public officials who are also  
14 market participants in their personal capacities.

15 The FTC's contrary position that the  
16 agency's officials must be disinterested cannot be  
17 reconciled with this Court's jurisprudence for three  
18 reasons: First, respect for federalism requires  
19 deference to a State's sovereign choices concerning how  
20 to structure and manage its own regulatory agencies.  
21 Second, the regulatory conduct of public officials who  
22 are also market participants cannot properly be equated  
23 with the conduct of private businesspeople. And third,  
24 the FTC's position would be massively and needlessly  
25 disrupted.

1           States obtain valuable benefits from using  
2   market participants as part-time public officials. They  
3   gain the benefits of their expertise and they gain the  
4   benefits of not having to have a full-time bureaucracy  
5   with a full salary.

6           JUSTICE ALITO:           Is it -- is it a question of  
7   Federal law or a question of State law whether the  
8   members of -- whether this board is a State  
9   instrumentality?

10          MR. MOOPPAN:           Ultimately whether this board  
11   should be entitled to State action immunity is a  
12   question of Federal law. But in characterizing the  
13   board as public or private, we submit that absent  
14   extraordinary circumstances, the Federal court should  
15   treat a State's designation of a State entity as public,  
16   and that when that entity is charged with public duties  
17   as a State entity.

18          JUSTICE ALITO:           Well, if you agree that a  
19   State can't simply deem something that for all other  
20   purposes is private to be a State entity or  
21   instrumentality, there has to be some test. So what  
22   would the test be?

23          MR. MOOPPAN:           So we think the -- the  
24   fundamental key is that it's not just that they're  
25   designated as State officials but they are charged with

1 a State law duty to enforce State law. They are not  
2 acting pursuant to their unfettered private discretion  
3 to choose whatever -- whatever choices maximize their  
4 personal profit. They are obligated --

5 JUSTICE GINSBURG: Here, in this case, they  
6 didn't enforce State law. One puzzle in this case: Why  
7 should there be an antitrust exemption for conduct that  
8 is not authorized by state law? The objection here was  
9 that this board was issuing a whole bunch of cease and  
10 desist orders. They had no authority to do that. No  
11 authority at all.

12 MR. MOOPPAN: Well, two points about that,  
13 Your Honor. First, it's not quite right to say that  
14 this board didn't have authority to issue these letters.  
15 It is true that the board doesn't have authority to  
16 issue self-executing orders akin to an injunction, but  
17 it is also true that the board has authority to send  
18 letters to prospective non-dentists saying that if you  
19 don't cease and desist your conduct, we will sue you.

20 The only question in this case in terms of  
21 State law authority is whether the wording of these  
22 letters was somehow problematic. No State court has  
23 ever determined that that is a problem, and more  
24 fundamentally, all of that is a question about whether  
25 there is a clear articulation here, and the FTC has

1     assumed that there is a clear articulation.

2             JUSTICE KAGAN:             Mr. Mooppan, can I take you  
3     back to Justice Alito's question, because I think you  
4     said in response that the question -- that the answer  
5     was has the State asked the organization to enforce  
6     State law and given -- entrusted them with that  
7     responsibility.

8             So suppose a State just looked around and  
9     found a trade association and said we think that that  
10    trade association is going to be a very good enforcer of  
11    State law, and made the trade association a State  
12    entity. That's the board that's going to regulate this  
13    industry. Would that be sufficient?

14            MR. MOOPPAN:            If they had a State -- if they  
15    took an oath to the State to enforce State law, if they  
16    were subject to the traditional duties that a public  
17    entity has, if they had to comply with the  
18    Administrative Procedures Act and the open records rules  
19    and the ethics laws, if they were subject to judicial  
20    review, absolutely.

21            JUSTICE KAGAN:           Well, which of those are the  
22    important ones? Do all of them have to be there?

23            MR. MOOPPAN:            We think the absolute key is  
24    that they're subject to a State law duty, that they have  
25    sworn an oath to the State to enforce State law and not

1 to maximize their own private --

2 JUSTICE SCALIA: No, I don't buy -- I -- I  
3 think in the trade association case, I get off your  
4 train. It seems to me it's quite different to appoint  
5 a -- what should I say -- an entity that is already a  
6 conglomerate, which is already a contract or combination  
7 of individuals, and to authorize that separately created  
8 combination of individuals to enforce State law. I  
9 think that's quite different from saying we're going to  
10 have a board composed of dentists and we're going to  
11 pick the dentists.

12 MR. MOOPPAN: Well, it is different, Your  
13 Honor.

14 JUSTICE SCALIA: And they are serving only  
15 in their individual capacity on this board, whereas the  
16 people in the trade association you're talking about  
17 are -- I guess the governors of the trade association  
18 are elected by the members; right?

19 MR. MOOPPAN: Well, but that's the key, Your  
20 Honor. I agree it is a more difficult case, but if the  
21 State law had basically drafted a private trade  
22 association and said: You will serve two hats;  
23 sometimes you will act as a private trade association  
24 but sometimes you will be the entity of the State that  
25 is responsible for enforcing State law. You have a

1 State law oath to enforce State law. You cannot take  
2 your actions to maximize your private gain. What you're  
3 doing here is enforcing State law.

4 JUSTICE BREYER: Well, my goodness, there's  
5 a lot of cases. I would have thought it was  
6 well-established that if, in fact, the State says to a  
7 group of wine merchants, you go fix your own wine  
8 prices, be sure they're reasonable; or to a group of  
9 truckers, you go set your own trucking prices but be  
10 sure they're reasonable, et cetera, et cetera, that they  
11 can do that if, and only if, there is supervision. And  
12 because, you know, they might get out of hand, the wine  
13 merchants or the truckers or anybody else.

14 Now, I started from that proposition. You  
15 seem to be questioning that proposition.

16 MR. MOOPPAN: Not at all, Your Honor.

17 JUSTICE BREYER: All right. If we accept  
18 that proposition, then how is your case any different?  
19 Because what we have here is we have a group of dentists  
20 like the group of wine merchants, like the group of  
21 truckers, and of course they're not fixing prices, what  
22 they're doing is deciding who will be in the business  
23 and there we are, end of case. Is there supervision,  
24 yes or no? The FTC says, no, there isn't, and I want to  
25 know what you say to that.



1           MR. MOOPPAN:           The fundamental difference  
2 between the hypothetical you posed and this case is that  
3 when you have private people who are authorized to set  
4 their own prices, even if the State statute says they  
5 must be reasonable, they are exercising their discretion  
6 about what is reasonable in terms of maximizing their  
7 personal profit. They are not acting as fiduciaries of  
8 the State. They have no obligation to the State. They  
9 have not sworn an oath to the State. They're not  
10 subject to the State's administrative procedures --

11           JUSTICE BREYER:           No, no, no. Well, we put  
12 all that in. We put all that in. We say our truckers  
13 and our wine merchants swear an oath. I swear that I am  
14 a member now of the State commission setting prices and  
15 I swear that I will be reasonable. Okay?

16           You think that would have changed the Midcal  
17 result?

18           MR. MOOPPAN:           Well, since those are  
19 essentially the facts of Parker I do think it would  
20 actually change the result. The commission in Parker --

21           JUSTICE BREYER:           What happened? All that  
22 happened is they take an oath. For all I know, maybe  
23 the Midcal wine people did take an oath.

24           MR. MOOPPAN:           They did and --

25           JUSTICE BREYER:           Okay. Suppose I say I

1 don't think that's --

2 MR. MOOPPAN: It is no small thing --

3 JUSTICE BREYER: -- is there anything else?

4 MR. MOOPPAN: Huh?

5 JUSTICE BREYER: Is there anything else  
6 besides the oath? Is this case identical to Midcal  
7 except they -- they took an oath?

8 MR. MOOPPAN: No. So compared to Midcal  
9 there was literally no substantive standard whatsoever  
10 in the California statute. They were free to set  
11 whatever price they want, not even a reasonableness  
12 constraint.

13 In addition, not only is there the oath,  
14 there's the fact that they are subject to all of the  
15 traditional duties that public entities have. They have  
16 to comply with the APA, the State ethics rules, open  
17 meetings rules, public records laws. None of that  
18 was --

19 JUSTICE GINSBURG: But why is it entirely  
20 reasonable to say, yes, this can be a State actor, but  
21 because they are made at the same time the State says  
22 they must be in private practice. So they're both the  
23 State actor and they're private actor.

24 So yes, you can have such a board, but there  
25 needs to be a check of supervision; that is, they can't

1 just go make their regulations without approval from  
2 some State entity and they can't go around issuing cease  
3 and desist orders. They have to come to a court. If  
4 they want to -- and the court would act as the check.

5 Why shouldn't -- because of the risk that  
6 these people have the self-interest, why shouldn't there  
7 be a check of the kind that Midcal --

8 MR. MOOPPAN: Because, fundamentally, it is  
9 a question for the State to determine whether it wants  
10 to bear that risk. These are the State's officials and  
11 the State has made a different choice. The State has  
12 decided that the benefits of having market participants  
13 make decisions and not having their every -- each and  
14 every decision actively second-guessed by a higher level  
15 of bureaucracy is worth it.

16 JUSTICE SOTOMAYOR: That -- it really begs  
17 the question, if we give immunity because only when we  
18 have a clearly defined State intent, a policy accepted  
19 and created by the State, what -- how is the State doing  
20 that when all it's doing is letting dentists elect the  
21 representatives of their board? This is not an  
22 appointed position. This is an elected position by  
23 dentists of each other.

24 How is the State going to be any different  
25 in giving that group of private actors a pass on

1 antitrust litigation that -- when they have a  
2 self-interest that's inherent in their occupation?

3 MR. MOOPPAN: Well, the State gets involved  
4 at the front end in two ways. First, there has to be a  
5 clearly articulated anticompetitive policy, and in this  
6 case --

7 JUSTICE GINSBURG: And what is that clearly  
8 articulated policy?

9 MR. MOOPPAN: In this case it's been assumed  
10 by the FTC that that is satisfied here. What I would  
11 submit is the reason it exists is because the Dental  
12 Practice Act says that only licensed dentists can  
13 practice dentistry. That is on its face inherently  
14 anticompetitive.

15 JUSTICE GINSBURG: But is there any clear  
16 policy that teeth whitening is the practice of  
17 dentistry? I thought that that was determined before --  
18 the standard about removing stains on teeth, that that  
19 was before anybody ever knew about whitening.

20 MR. MOOPPAN: That's an interpretative  
21 question under the statute. And what this Court has  
22 held in cases like Omni is application of a clearly  
23 articulated State policy is a question for State  
24 administrator review.

25 JUSTICE GINSBURG: But how can it be clearly

1 articulated when the problem being addressed didn't even  
2 exist when the -- when the policy was --

3 MR. MOOPPAN: For the same reason that in  
4 Omni, for example. The State had authorized zoning, but  
5 they hadn't asked whether the particular ordinance  
6 passed in Omni was complying with substantive and  
7 procedural law. And what this Court held is once you  
8 have at the threshold a statute that authorizes the  
9 displacement of competition, how public officials  
10 implement that statute is a question for State  
11 administrative review.

12 JUSTICE KENNEDY: The Federal government,  
13 the FTC and the Sherman Act have an interest in ensuring  
14 that regulators do not pursue their self-interest.

15 MR. MOOPPAN: They do not. That is --

16 JUSTICE KENNEDY: That's inconsistent then  
17 with what we said in Hallie. The City of Hallie, we  
18 said this is not a case in which we are concerned with  
19 entities pursuing their self-interest because it's the  
20 city.

21 MR. MOOPPAN: I don't think that -- Your  
22 Honor, with all respect, I don't think that's the  
23 correct interpretation of Hallie. I think if you look  
24 at that paragraph in its entirety the sentence  
25 immediately prior to the sentence you just quoted said

1 that the risk that we're worried about is that the State  
2 is circumventing the Federal antitrust laws.

3 The concern was not that the officials were  
4 going to act contrary to the State's interest. The  
5 concern was that the State was just authorizing them to  
6 violate Federal law. What -- and then two sentences  
7 after the sentence you just read, what the Court said is  
8 if the concern is that they have parochial interests,  
9 we'll work -- clear articulation solves that problem.

10 But if there's any ambiguity about where --  
11 what Hallie says on this it's resolved by Omni, because  
12 if ever there were a case where the State's officials  
13 had the self-interest, where they might have been acting  
14 contrary to the State's own interest, it's when the  
15 State's officials are being bribed by private parties.

16 JUSTICE KAGAN: Mr. Mooppan, could we -- you  
17 have to explain that understanding of Hallie to me. And  
18 Hallie is a very important case because it essentially  
19 asks the question that's right here, which is we have  
20 this odd entity and we have to decide whether that  
21 entity is more like just private parties or is more like  
22 a prototypical State actor. And there we say it's more  
23 like a prototypical State actor.

24 And how do we get there? We say the  
25 requirement of active State supervision is a way of

1 ensuring that the actor is engaging in the challenged  
2 conduct pursuant to State policy. And we need to have  
3 that test, we need to have that test when there's a real  
4 danger that the party is acting to further his own  
5 interest but not when there is not such a danger.

6 And here that suggests that the question is:  
7 Is this party, this board of all dentists, is there a  
8 danger that it's acting to further its own interests  
9 rather than the governmental interests of the State?  
10 And that seems almost self-evidently to be true.

11 MR. MOOPPAN: With all due respect, Your  
12 Honor, I think you've skipped a sentence in Hallie. In  
13 between the first sentence and the second sentence you  
14 read me there is a sentence that says the rest -- the  
15 purpose of the active supervision requirement is to  
16 prevent the State from circumventing the Sherman Act.  
17 The danger that the Court was talking about in the  
18 sentence you read is the danger that the State is just  
19 authorizing private people to violate Federal law rather  
20 than having its own State policy.

21 And that is what the Court meant in Hallie  
22 when they said there was no danger. There is no danger  
23 that the State create a municipality as an elaborate  
24 sham to let private people violate Federal law under the  
25 auspices of a municipality.

1 JUSTICE KENNEDY: But the concern is that  
2 there is no State policy if the State simply says we --  
3 you take an oath and then you do what you want. And if  
4 the board says we think what's good for dentistry is  
5 good for South -- good for North Carolina, our cases say  
6 that's not enough because you're pursuing your  
7 self-interest.

8 MR. MOOPPAN: Well, that's true, Your Honor,  
9 because there the statute says do what you want. But  
10 that's not what the statute here says, and a statute  
11 that says do what you want wouldn't be a clearly  
12 articulated policy to displace competition.

13 Here what the statute says is only licensed  
14 dentists can practice dentistry. That is a clearly  
15 articulate policy to displace competition, and the only  
16 question is whether the State's officials have properly  
17 implemented that statute.

18 CHIEF JUSTICE ROBERTS: Why is a statute  
19 that says do what you want not clearly articulated?

20 MR. MOOPPAN: Because it's neutral.

21 CHIEF JUSTICE ROBERTS: It says clearly --  
22 do what you want so long as it promotes the dental --  
23 monopoly of dentists.

24 MR. MOOPPAN: If it said do what you want to  
25 promote the monopoly of dentists, I guess at that point



1 it would be a clearly articulated policy to displace  
2 competition. In a circumstance like that where all that  
3 was at issue was a broad standard to do whatever was  
4 best for the dental practice and there were private  
5 parties and they were subject to no other type of  
6 judicial constraints, maybe that would be the sort of  
7 situation --

8 CHIEF JUSTICE ROBERTS: So it's not enough  
9 just to say, oh, you're a public agent or you're a  
10 public official.

11 MR. MOOPPAN: As I said to Justice Alito at  
12 the outset, in extraordinary circumstances perhaps this  
13 Court could say that what has been deemed a public  
14 agency by the State is essentially a sham, but this is  
15 far from that. The board in this case is structured  
16 like -- the work of the board in this case is  
17 accomplished like every other State agency. It is  
18 subject to the administrative procedures rules, it's  
19 subject to public records laws, it's subject to  
20 ethics --

21 CHIEF JUSTICE ROBERTS: But none of that's  
22 responsive to the concern that the State policy is  
23 purely to displace competition by promoting the  
24 self-interest of the dentist.

25 MR. MOOPPAN: It's response --

1 CHIEF JUSTICE ROBERTS: They can do that in  
2 open meeting. They can do that with let anyone look at  
3 the records but --

4 MR. MOOPPAN: It's responsive to the fact  
5 that if these people are acting contrary to the State's  
6 interest, the State can deal with it and the State has  
7 chosen to deal with it in a certain way. And the  
8 fundamental question in this case is does Federal law  
9 second-guess how the State has chosen to deal with this  
10 problem. And what we know from cases like Omni --

11 JUSTICE GINSBURG: The antitrust exemption  
12 is a matter of State law -- of Federal law, not State  
13 law. So it's -- the Federal law sets the dimensions of  
14 what fits within the State action. It's not up to the  
15 State to create the State action exemption. It's  
16 Federal law and what its metes and bounds are are also  
17 Federal law.

18 MR. MOOPPAN: That's true, but the line that  
19 this Court has consistently drawn from Parker onwards is  
20 that the Sherman Act does not apply to the acts of  
21 States or their officials when implementing laws  
22 directed by the legislature. And absent extraordinary  
23 circumstances, I would think that Congress did not  
24 intend for Federal courts to second-guess whether a  
25 public entity is really private.

1 JUSTICE GINSBURG: Tell me if I'm wrong  
2 about this, but I thought that the State action  
3 exemption was adopted and announced by this Court.

4 MR. MOOPPAN: It was.

5 JUSTICE GINSBURG: And that's nothing  
6 spelled out in a -- in a law.

7 MR. MOOPPAN: It was adopted by this Court.  
8 It's a version of a more general clear statement rule  
9 that this Court has consistently applied, that we  
10 don't -- the Court does not assume that Congress lightly  
11 intends to intrude on courts' sovereign prerogatives.  
12 It's just like cases like Gregory v. Ashcroft. What the  
13 Court said in Parker is nothing in the Sherman Act's  
14 text or history indicates any intent to interfere with  
15 sovereign State regulation, and therefore, States are  
16 not subject to the Sherman Act.

17 And the question in this case is when you  
18 have a State entity, that the State has labeled as a  
19 State entity -- but not just labeled, charged with a  
20 duty and subjected to all the duties that State agencies  
21 normally have --

22 JUSTICE GINSBURG: But there's -- there's  
23 another factor that the State has stipulated, that is,  
24 the State has said "and the members of this board must  
25 be private practitioners." That -- that is not your

1 typical State agency.

2 MR. MOOPPAN: Well, it actually is the  
3 typical way of regulating the professions. Every State  
4 medical board, every State dental board --

5 JUSTICE GINSBURG: And may be so, and that's  
6 why the FTC says we need a check, we need the Midcal  
7 check of some genuine State supervision over private --

8 MR. MOOPPAN: Well, I would submit it would  
9 cut the other direction, that we should -- we would  
10 require very clear intent that Congress intended to --  
11 to oversee and regulate the most traditional way of  
12 regulating the professions that States have historically  
13 used and have consistently used for a long time.

14 JUSTICE ALITO: What would happen if the  
15 North Carolina courts were to interpret the North  
16 Carolina statute that says that removing stains from  
17 teeth is the practice of dentistry, to apply to  
18 whitening? What would -- what would that mean for this  
19 case? Because that seems -- that's an unanswered  
20 question, isn't it? An unanswered question of -- of  
21 North Carolina law.

22 MR. MOOPPAN: It is an open question. If  
23 they were to interpret it to say that it was the  
24 practice of dentistry?

25 JUSTICE ALITO: Yes.

1           MR. MOOPPAN:           Well, I'm not sure what it  
2     would have to do -- the effect it would have on this  
3     case, because the FTC has already assumed that we are  
4     satisfied the clear articulation requirement. I assume  
5     it would make their case harder on remand to dispute  
6     that we were acting pursuant to clearly articulated  
7     policy.

8           But in terms of going forward, whether we --  
9     the board is correct about the meaning of the State  
10    statute is a question of State administrative review.  
11    If the State courts were to reach the opposite  
12    conclusion, then the board would have to stop this  
13    enforcement practice and they could be sued in State  
14    court if they did.

15          The fundamental question here is whether  
16    Federal courts need to second guess these State  
17    administrative questions. Just like in Omni, it was  
18    possible that the zoning ordinance that the city council  
19    promulgated in Omni was in violation of State law.  
20    There were all sorts of substantive and procedural  
21    requirements that needed to be followed, and this Court  
22    didn't ask whether any of those things were satisfied.  
23    This Court said that that is a question for State  
24    administrator review, not for Federal antitrust law,  
25    because the Sherman Act was never intended to supplant

1 State administrative review. That would turn federalism  
2 on its head.

3 And again, I would like to emphasize that  
4 that was in the context of city council officials who  
5 were allegedly being bribed. If city council officials  
6 who are allegedly being bribed are entitled to immunity,  
7 I find it very difficult to understand how the  
8 mere existence --

9 JUSTICE BREYER: The obvious difference is  
10 that city council officials are State officials, and a  
11 local wine merchant is a local wine merchant. He is not  
12 a State official. That's the obvious difference.

13 MR. MOOPPAN: Well, but these -- these are  
14 not just local wine merchants. These are people who --

15 JUSTICE BREYER: That's your other argument.  
16 You can -- I can understand your argument as saying, no,  
17 there's enough Stateness in this that they become State  
18 officials.

19 MR. MOOPPAN: Well, the --

20 JUSTICE BREYER: That's an argument I  
21 understand.

22 MR. MOOPPAN: So the -- let me --

23 JUSTICE BREYER: I don't understand how Omni  
24 supports you because there they were clearly not private  
25 people. I mean, they weren't private merchants. The

1 evil we are trying to get at was not present.

2 MR. MOOPPAN: I guess the fundamental key is  
3 that I don't really take the FTC to be disputing that  
4 these are public officials. What they are saying is  
5 they are public officials who have a conflict of  
6 interest. They're saying that they're not disinterested  
7 public officials.

8 They're not saying that they're actually  
9 private people. They're not saying that --

10 JUSTICE GINSBURG: Let's say they have to be  
11 because they are, by State law, they must be private  
12 practitioners. They cannot be full-time civil servants.

13 MR. MOOPPAN: They are --

14 JUSTICE GINSBURG: They can't be on this  
15 board unless you are a regularly practicing dentist.

16 MR. MOOPPAN: They are also private people.  
17 They serve -- they have two hats.

18 JUSTICE BREYER: Just that they're private  
19 people. The object of the antitrust laws is to prevent  
20 private individuals who compete with each other in  
21 business from getting together and making agreements.  
22 That kind of interest seems present here, present in  
23 Midcal, and present in all the other cases, but not  
24 present in Hallie. Because in Hallie they were private,  
25 yes, but they're not businesspeople about to make

1 agreements with each other in the sense that the  
2 antitrust law is concerned.

3 MR. MOOPPAN: Well, two points about that,  
4 Your Honor. First of all, in Parker, the people on the  
5 commission were, in fact, market participants, and yet  
6 this Court still treated that --

7 JUSTICE BREYER: If you don't -- you might  
8 not agree with my analysis, and -- and go on with this  
9 because I'll work that one out.

10 MR. MOOPPAN: Okay. So in setting aside  
11 Parker, I think the more fundamental point is the -- the  
12 Federal antitrust laws shouldn't be interpreted to  
13 second guess whether a public official is really private  
14 just because they have a conflict of interest.

15 JUSTICE SOTOMAYOR: Do we set aside  
16 Goldfarb?

17 MR. MOOPPAN: No. Goldfarb, the basis --

18 JUSTICE SOTOMAYOR: Goldfarb says the fact  
19 that the State bars the same agency for some limited  
20 purpose does not create an antitrust shield that allows  
21 it to foster anticompetitive practices of the benefit to  
22 its members.

23 MR. MOOPPAN: Absolutely. Goldfarb -- what  
24 you need in addition is a clearly articulated policy of  
25 displaced competition. That was lacking in Goldfarb as



1 the Court explained in Goldfarb and has reaffirmed in  
2 cases like Southern Motor Carriers, and it is present  
3 here and the FTC doesn't dispute -- or at least for  
4 present purposes that it is present here.

5 The question in this case, unlike in  
6 Goldfarb, is whether a board that has public -- that has  
7 market participants on it are entitled to immunity even  
8 when enforcing a clearly articulated policy of displaced  
9 competition.

10 JUSTICE KAGAN: But, Mr. Mooppan, the two  
11 prongs of Midcal are supposed to operate in tandem with  
12 each other. They both have a role to play in ensuring  
13 that an actor is in accord with the State policy and is  
14 not acting solely to further his own interest.

15 So the first prong comes along and says  
16 here's what -- there needs to be a State policy, and  
17 then the second prong -- because we understand that that  
18 policy is not going to answer all questions. There are  
19 going to be lots of little things that the actor does,  
20 and the question is going to be are you acting in accord  
21 with that State policy or not. And then there needs to  
22 be some supervision to ensure that the actor is acting  
23 in accord with State policy.

24 So to strip the second half of the test off  
25 is to leave the first half of the test essentially --

1     you know, "meaningless" might be too strong, but  
2     unprotected. There's no way to make sure that the  
3     people are acting in accord with State policy rather  
4     than to serve their own interests.

5             MR. MOOPPAN:             Your Honor, I just  
6     fundamentally don't think that that is the point of the  
7     second prong. The point -- the concern that you are  
8     articulating, the way to solve that problem is through  
9     State administrator review. That's what Omni held. If  
10    there's a -- if there's a possibility that State  
11    officials are misapplying State law, are deviating from  
12    State policy, that can be solved through State  
13    administrator review, and Federal antitrust law was  
14    never intended to second guess that question.

15            JUSTICE GINSBURG:        When you --

16            MR. MOOPPAN:            What active supervision is  
17    intended to do instead is to prevent the State from  
18    authorizing private people to violate Federal law, even  
19    if that's what the State wants. Take a case like  
20    Midcal, the economical act of supervision case.

21            JUSTICE KAGAN:           I think all over,  
22    Mr. Mooppan, it's in Patrick v. Burget, it's in other  
23    cases, that the act of supervision prong is -- is to  
24    make sure that the action is the State's own, it's in  
25    accord with the State's policy. That's what it's doing.

1           MR. MOOPPAN:           By State's own, what the Court  
2   meant is they are not just authorizing private people to  
3   act illegally. Take a case like Midcal where the State  
4   said, go set prices. No substantive standard  
5   whatsoever. There was no reason to think that the  
6   private people were acting contrary to the State policy  
7   because the State just wanted to let them fix prices.

8           The point of active supervision in a case  
9   like Midcal is to make sure that private parties are not  
10   just being authorized the power to violate Federal law  
11   because private parties are presumptively subject to  
12   Federal law and the only way they can get immunity is if  
13   their actions are made the State's own by the State's  
14   supervision. That is not necessary when the State has  
15   already made their conduct their own by making them  
16   public officials and charging them with the State law  
17   duty to enforce State law.

18           If I can reserve the balance of my time.

19           CHIEF JUSTICE ROBERTS:           Thank you, counsel.  
20           Mr. Stewart.

21           ORAL ARGUMENT OF MALCOLM L. STEWART

22           ON BEHALF OF RESPONDENT

23           MR. STEWART:           Mr. Chief Justice, and may it  
24   please the Court:

25           If the dental board were designated a

1 private agency, this would be a paradigmatic case  
 2 illustrating the reasons that active supervision is  
 3 required. The board members, the majority of them at  
 4 least, are required to be practicing dentists, they have  
 5 an evident self-interest in the manner in which the  
 6 dental profession is regulated and in regulations that  
 7 might keep other people from competing with dentists.

8 That natural self-interest is reinforced by  
 9 the method of selection. North Carolina law provides  
 10 that the members of this dental board will be selected  
 11 not by the governor or by the public, but by the  
 12 community of dentists.

13 JUSTICE KAGAN: You are not suggesting, or  
 14 are you, that that's critical to your case?

15 MR. STEWART: We're not saying that that's  
 16 critical. That's simply a --

17 JUSTICE KAGAN: It's just like an add-on  
 18 feature.

19 MR. STEWART: That's right. And -- and  
 20 that's the way the commission treated it in its opinion.  
 21 The commission didn't suggest that the outcome would  
 22 have been different if the method of selection had been  
 23 different.

24 JUSTICE SCALIA: What do you do about a  
 25 State supreme court that sets the ethics rules for the

1 legal profession, including what constitutes the  
2 unauthorized practice of law? And let's assume the  
3 State has a requirement that all members of the State  
4 supreme court have to be lawyers. What do you do about  
5 that?

6 MR. STEWART: I mean, this is essentially  
7 Goldfarb. Goldfarb involved the Virginia Bar, it was  
8 designated as a State agency as a matter of law.

9 JUSTICE SCALIA: I'm not talking about the  
10 Virginia Bar. I'm talking about the Supreme Court of  
11 Virginia.

12 MR. STEWART: The Court in Goldfarb --

13 JUSTICE SCALIA: Are you going to say the  
14 Supreme Court of Virginia has to be actively supervised?

15 MR. STEWART: No, the Supreme Court of  
16 Virginia -- the Supreme Court of any State, like the  
17 State legislature, speaks for the State itself.

18 JUSTICE SCALIA: They are all lawyers.

19 MR. STEWART: And that is simply an  
20 unavoidable exception, if you will, to the general  
21 requirement --

22 JUSTICE GINSBURG: But they are not  
23 practicing lawyers?

24 MR. STEWART: They are not practicing  
25 lawyers. Whatever marginal self-interest they might

1 have is outweighed by their status as supreme court bar  
2 -- as supreme court justices.

3 CHIEF JUSTICE ROBERTS: Presumably they also  
4 set judicial ethics rules.

5 MR. STEWART: They would set judicial ethics  
6 rules. But what I was saying about Goldfarb is that  
7 Goldfarb dealt with the relationship between what the  
8 Virginia Supreme Court did and what the Virginia Bar  
9 did. And it said, of course, the Virginia -- the ethics  
10 rules promulgated by the Virginia Supreme Court would be  
11 the authoritative state policy --

12 JUSTICE BREYER: Maybe we can pursue this,  
13 because I think that's the question exactly that is  
14 bothering me, but I have another example of the same  
15 thing, and I think it's for me a very difficult case.  
16 On the one hand, I absolutely understand the cases, and  
17 I understand the law -- at least I think I do. You  
18 would be pretty careful about having a group of wine  
19 merchants set their own prices or decide who can sell.  
20 And the same is true of a group of railroads and the  
21 same is true of a group of truckers and the same is true  
22 blah, blah, blah, okay, probably including dentists.

23 So what we have is a set of pretty tough  
24 rules saying the State had better get in there and  
25 supervise or you are subject to the antitrust laws.

1 That to me is the state of the art. And that all seems  
2 fine and you seemed -- until I thought of a different  
3 example. Now, what they are is they are neurologists  
4 and they are brain surgeons, and what the State says is:  
5 We would like this group of brain surgeons to decide who  
6 can practice brain surgery in this State. I don't want  
7 a group of bureaucrats deciding that. I would like  
8 brain surgeons to decide that. Of course the risks are  
9 -- and so we have to have some supervision, I guess.  
10 What? What kind of supervision? And why isn't that  
11 present here? A, any rule has to go to some rule  
12 revision agency. B, before they can throw anybody out,  
13 they have to go into court and get a court order. And  
14 C, even these letters would be subject to their state  
15 ABA.

16 So if I'm on your track, I want to see you  
17 talk about the neurologists and any kind of serious  
18 medical board, and I don't want to suddenly destroy all  
19 the temptation of medical boards throughout the country  
20 to decide everything in favor of letting in the  
21 unqualified person, lest he sue them under the antitrust  
22 law for treble damages and attorneys' fees. Those are  
23 the things that -- have you followed where I'm coming  
24 from? And I would very much appreciate your comment.

25 MR. STEWART: What is true of the Dental

1 Board in North Carolina and could also be true of the  
 2 neurology or the more general medical board in another  
 3 State is, as you say, any regulation that the board  
 4 promulgates as a matter of North Carolina law is subject  
 5 to review by the Rules Review Commission. And that's a  
 6 body of disinterested State actors who pass on the  
 7 validity of the rules, that the standard in the statute  
 8 is the Rules Review Commission determines is the  
 9 regulation reasonably necessary to implement the  
 10 statute, which at least suggests to me that the review  
 11 commission is engaged in something like de novo review:  
 12 Does this reflect the correct reading of the law.

13 JUSTICE SCALIA: Really, really? You are  
 14 going to have a review board composed of  
 15 non-neurologists deciding de novo whether a particular  
 16 person should be admitted or a particular rule should be  
 17 adopted?

18 MR. STEWART: For rules, and the basis  
 19 for --

20 JUSTICE SCALIA: I don't want that. I want  
 21 a neurologist to decide it.

22 MR. STEWART: If the State wanted a board of  
 23 expert practitioners to be able to promulgate rules and  
 24 have those rules reviewed deferentially within the State  
 25 agency, then the question would arise, is deferential



1 review sufficient to constitute active supervision? If  
2 it were de novo, yes. Patrick v. Burget makes clear  
3 that extremely deferential review, review only for  
4 procedural regularity, is not sufficient. And the  
5 question, is Chevron-type review enough, that's an open  
6 question.

7 But the main point I'm making about the  
8 Rules Review Commission is North Carolina evidently  
9 doesn't believe that there is anything amiss with an  
10 agency composed of -- the Rules Review Commission, an  
11 agency composed of nonexperts, reviewing the regulations  
12 promulgated by an expert body for consistency with the  
13 governing statutes.

14 Now, the question of exclusion of an  
15 individual member, a proceeding to revoke the license of  
16 a particular practitioner, whether or not that would  
17 qualify for State action immunity, it's very unlikely to  
18 have adverse consequences for competition as a whole  
19 and, therefore, would not likely be a subject of  
20 antitrust concern.

21 I'm sorry, Mr. Justice.

22 JUSTICE ALITO: Could you tell me as  
23 precisely as you can the contours of the rule that you  
24 are advocating? You told Justice Kagan that election  
25 isn't essential to the analysis here. So is it

1 essential that the statute -- that the statute  
2 stipulates that the members must be dentists? If they  
3 were appointed by the governor, would that take care of  
4 it? If the governor had to appoint dentists, would that  
5 -- would that involve the same problem? Is it essential  
6 that they must all be dentists? What if there is a  
7 breakdown between dentists and nondentists?

8 Let me just add this. What if there is no  
9 requirement that they be dentists but the governor  
10 always chooses dentists, because there's a very powerful  
11 dentist lobby; so he is always going to put dentists on  
12 this board exclusively.

13 MR. STEWART: I would say two things -- I'd  
14 say three things maybe. I think, first, we would say  
15 our theory still applies that the self-interest would be  
16 present whether or not they were required to be  
17 dentists.

18 The second thing we would say is, but that's  
19 a harder case. In that situation you would at least  
20 need to look beyond the statute books in order to  
21 determine whether the people were dentists and you would  
22 get, at least, a little closer to --

23 JUSTICE ALITO: I think that's what troubles  
24 me about your position because it seems to lead to a  
25 case, State by State, board by board, inquiry by the

1 Federal courts as to whether the members of a regulatory  
2 body are really serving the public interest or whether  
3 they have been captured by some special interest?

4 MR. STEWART: I guess the third point I was  
5 going to make is we're not aware of any board like that.  
6 That is, the amicus briefs on both sides say that it is  
7 a frequent practice for States to establish regulatory  
8 boards that are required by law to be composed of  
9 members of the profession being regulated, and the  
10 amicus briefs on the other side says, that's a good and  
11 efficient practice. The amicus briefs on our side say  
12 that's a problem. But they all agree that that is a  
13 prevalent practice.

14 JUSTICE BREYER: Under that practice, you  
15 said it's not an antitrust violation: Boycott. The guy  
16 didn't get into the profession. He flunked the exam.  
17 The antitrust lawyer says: I'm out of this profession;  
18 I would offer them competition. We only have 82  
19 qualified people in this specialty in this State. Now  
20 there is only 81. That makes a difference. Their  
21 questions are unfair, they are against me, and for a  
22 bunch of reasons.

23 Silver v. New York Stock Exchange. You  
24 know, it's not hard to make up reasons. I don't want to  
25 cut you off from Justice Alito, but I would like you to

1   also, in doing that, to think about what my problem is.  
2   It's the neurologists who are subject to the antitrust  
3   suit. And the answer seems to lie in the kind of  
4   supervision that you are advocating.

5           Now, go ahead and go back to Justice Alito,  
6   but I put that in your mind.

7           MR. STEWART:           I guess the point I was going  
8   to make is, while there is a frequent practice of States  
9   requiring by law that regulatory boards be staffed by  
10  members of the profession, that there appears to be no  
11  instance in which the State left it up to the governor  
12  whom to decide to appoint and the governor chose to  
13  appoint only practitioners. I mean, part of our point  
14  in this case --

15          JUSTICE ALITO:           Does that mean that is what  
16  is critical in your opinion, that there is a State  
17  statute that says they must be dentists? If that  
18  weren't there, but the governor always chose dentists  
19  because he wants the dentists' vote and the dentists are  
20  very powerful in that particular State --

21          MR. STEWART:           We're not prepared to give  
22  that up, but we don't think that that's as strong a  
23  case. I mean, the fact that they are required to be  
24  dentists signals that they are there in their capacity  
25  as such.

1 JUSTICE ALITO: If you are not prepared to  
2 give that up, then I really don't understand the  
3 contours of your rule. And I find it troubling, because  
4 I really am not attracted to the idea of Federal courts  
5 looking at State agencies, State regulatory entities, to  
6 determine whether they are really serving the public  
7 interest or they are serving some private interest.

8 MR. STEWART: We're certainly not advocating  
9 that the Court look to the internal subjective  
10 decision-making processes of the individual members.  
11 That is, if the members were -- if the membership of the  
12 board were people who had no active participation in the  
13 dental profession, who had no economic interest.  
14 The Court in Omni Outdoor certainly made it clear that  
15 the Court is not supposed to be probing whether, in  
16 fact, an individual board member made a decision based  
17 on illicit criteria.

18 JUSTICE KAGAN: So to the same sort of  
19 question. Suppose that, you know, we come out with a  
20 ruling that makes clear that an all-dentists board is  
21 not okay and then a State says, okay, we'll do a board  
22 with five dentists and three non-dentists. How do we  
23 feel about that.

24 MR. STEWART: It would still be a  
25 majority or I think the commission used some phrase like

1 "decisive coalition." And in this case, in a sense, the  
2 majority treatment of the dentists on the board was  
3 exacerbated. Only six of nine of the board members are  
4 actually practicing dentists. But three of the  
5 members --

6 JUSTICE SCALIA: What about ex-dentists?  
7 They're -- they're no longer practicing. But they're  
8 all dentists and they have a lot of dentist friends.  
9 They're sympathetic to the profession of dentistry. Are  
10 you going to give them a pass?

11 MR. STEWART: I think if the -- if you --  
12 the board were composed of retired dentists, people who  
13 were selected because they had expertise but no current  
14 financial interest, that would be a legitimate way of  
15 staffing.

16 JUSTICE SCALIA: Okay. Okay. Do you really  
17 think that the financial interest of the individual  
18 members of the board is going to be significantly  
19 affected? Of each individual member of the board? My  
20 goodness. I -- I find that hard to believe.

21 MR. STEWART: I guess to my -- to my  
22 previous answer, I should add if those board members  
23 were selected by a dispassionate State official; that  
24 is, there could also be circumstances in which board  
25 members themselves had no financial interest but were

1     selected by those who do. And that might be treated as  
2     a separate --

3             JUSTICE KENNEDY:             Well, going back to  
4     Justice Alito's question, if we have to look at it board  
5     by board, if I were a private practitioner and, in  
6     Justice Breyer's hypothetical, a neurologist came to me  
7     and said, I think it's important for us to do standards,  
8     can I get on this board? I say, have no part of it.  
9     Triple damages, attorneys' fees. You can't even afford  
10    to defend this case. Get off that board. That's going  
11    to be the consequence of your -- of the rule you  
12    advocate it seems to me.

13            MR. STEWART:            There's no problem with active  
14    participation by -- but there's no problem with the  
15    board -- boards being staffed by active practitioners so  
16    long as they are adequately supervised.

17            JUSTICE BREYER:           Does that consist of -- if  
18    you want my off-the-cuff idea, which is probably not  
19    particularly good to give you -- that active -- that  
20    supervision consists of either your board on regulation  
21    or a court which, when reviewing what they do, does so  
22    with an awareness of the State law and the subject and  
23    also the risks of anticompetitive harms. Ready to set  
24    it aside if, in fact, those risks, which are outside  
25    what the State law wants, seem likely to eventuate.

1           Now, I could write such a standard pretty  
2 vaguely and that's not necessarily the right standard.  
3 But this whole thing turns to me on what the supervision  
4 consists of and whether it's good enough or not here.  
5 And so that's why I repeat for the -- you know, like the  
6 third time, and I think you -- probably the government  
7 doesn't have a definite position on this or what it  
8 consists of.

9           MR. STEWART:           I mean, there are different --

10          JUSTICE BREYER:          Not that you should. But I  
11 just want to --

12          MR. STEWART:           I mean, there are -- there are  
13 different things that could qualify as adequate  
14 supervision and, in part, that turns on the nature of  
15 the question to be answered. That is, the difficult  
16 question that is posed in this case or the -- the  
17 ultimate contested question is: Is teeth whitening the  
18 practice of dentistry as defined by North Carolina law?  
19 That is a question of statutory interpretation. The  
20 North Carolina statute speaks of removing stains or  
21 accretions from the human teeth. There are arguments on  
22 both sides as to whether that encompasses the teeth  
23 whitening methods that are used today. That's the kind  
24 of dispute that is capable of being definitively  
25 resolved by --



1 JUSTICE BREYER: But they'd have to give  
2 deference to the expert board's determination that would  
3 be normal.

4 MR. STEWART: They -- they might or might  
5 not --

6 JUSTICE BREYER: Well, if it's not, then  
7 you're going to have the neurology qualification  
8 determination made by some people in the State who are  
9 not neurologists. Now, that to me spells danger.

10 MR. STEWART: And the point I was going to  
11 make was the determination of whether a particular  
12 individual is qualified to practice neurology is a  
13 different sort of question from the issue is teeth  
14 whitening the practice of dentistry. That question is  
15 one of law that a court is capable of deciding. It  
16 might or might not give deference to the views of a  
17 particular administrative agency.

18 In our view, it would certainly make sense  
19 not, as a matter of State administrative law, not to  
20 give deference to the view of self-interested  
21 practitioners for the same reasons that -- on that legal  
22 question for the same reasons that --

23 CHIEF JUSTICE ROBERTS: What if the -- I'm  
24 sorry. Please.

25 MR. STEWART: -- for the same reason that we

1 think the State action immunity shouldn't apply.

2 CHIEF JUSTICE ROBERTS: Well, what if one of  
3 the members of the board is appointed as a full-time  
4 member of the board for a one-year term and he's -- he's  
5 called the board state supervisor, is that good enough?

6 MR. STEWART: I mean, it depends on what --  
7 first, it would -- we would want to look into the  
8 question does that alleviate his financial interest.  
9 What is his --

10 CHIEF JUSTICE ROBERTS: No. It's only --  
11 it's one year. But for that one year he's not  
12 practicing dentistry or whatever. And that way the  
13 supervisor is -- responsive to Justice Breyer's  
14 concern -- the supervisor knows what he's talking about  
15 when it comes to dentistry.

16 MR. STEWART: I guess in -- in order even  
17 potentially to qualify as satisfying the active  
18 supervision requirement, the one supervisory member  
19 would have to have the power to countermand the orders  
20 issued by the other members. If it were simply one and  
21 he were designated a supervisor, but he didn't have the  
22 authority to do --

23 CHIEF JUSTICE ROBERTS: Okay. So he has the  
24 authority. For that one year, he can veto whatever the  
25 board decides to do.

1           MR. STEWART:           I'm -- I'm hesitant to take a  
2 position on behalf of the FTC because it would turn on  
3 part -- in part on would the expectation that this  
4 person will return to private practice after a year be  
5 sufficient to maintain his fundamentally private  
6 characteristic.

7           JUSTICE SCALIA:           Well, I mean, the question  
8 that follows is: What if all of the members of the  
9 board have to refrain from the practice of dentistry  
10 during the year that they serve? And you're saying you  
11 don't know what the answer will be to that? What the  
12 FTC will say to that? I know what the FTC will say to  
13 that.

14          MR. STEWART:           Well, I guess part of what I  
15 would say in response to these hypotheticals -- and it's  
16 not that they're not legitimate questions. But this --  
17 this seems to us to be the case at the furthest end of  
18 the spectrum from those. This is a case in which the  
19 only members of the board who actually participated in  
20 the decision to issue the cease and desist letters were  
21 practicing dentists. They were people who were required  
22 by law to be practicing dentists. They were appointed  
23 by other practicing dentists.

24          The other thing I would say --

25          JUSTICE SOTOMAYOR:           Mr. Stewart, the problem

1 with your answer, at least for me, is that you're being  
 2 asked for the rule that we're going to announce not just  
 3 in this case, but to guide the decision-making for  
 4 future courts. I mean, just to say this board we can do  
 5 it the way Judge Keenan did, and say it was an elected  
 6 board, but an appointed board is different. We can say  
 7 one of a dozen sort of limitations or not. So what do  
 8 we say? How do we articulate your ruling?

9 MR. STEWART: I mean, the way I read both  
 10 Judge Keenan's concurrence and the majority opinion is  
 11 both of those said, at least where the members are  
 12 selected by other practicing dentists, there is no State  
 13 action immunity. We leave for another day the question  
 14 whether the outcome would be different if the members  
 15 were selected by the government.

16 JUSTICE SOTOMAYOR: Now, that's what the  
 17 Supreme Court does. It walks that line and it goes and  
 18 looks at the trajectory we're taking. And so my  
 19 colleagues have expressed the concern that the  
 20 trajectory will involve us in case after case trying to  
 21 decide how far too far is.

22 MR. STEWART: And frankly, if the Court  
 23 wanted to say, as part of its opinion, as long as they  
 24 are actually required by law to be practicing dentists,  
 25 there's no State action immunity, but if the law doesn't

1     require that and it happens to be the pattern of  
2     gubernatorial appointment, if the Court says that -- the  
3     outcome would, in fact, be different in that case, we  
4     would prefer that to a decision that says we're going to  
5     give these boards a blanket pass because we can foresee  
6     some hard questions at the end of the day.

7             JUSTICE BREYER:             Look. Take your -- suppose  
8     I write that down. Still the problem in the back of my  
9     mind is there are now 311 million Americans who are  
10    going to have medical care. And this is -- I agree with  
11    you. This is at one extreme. But -- but those words  
12    that you just enunciated seem to cover to exactly the  
13    same extent every medical specialty. And I've  
14    articulated that already that that's my concern. So I  
15    wonder if you can do something a little bit better  
16    before we say that the doctors cannot be active doctors  
17    and decide on the qualifications of doctors.

18            MR. STEWART:            I guess the -- the two  
19    things -- the two or three things I would say are first,  
20    I think the decisions about whether particular  
21    individual practitioners will be licensed or have their  
22    license -- license revoked is a fundamentally different  
23    type of determination from the legal question is teeth  
24    whitening or some other generic type of service the  
25    practice of dentistry within particular State law.

1           The second thing is although, Justice  
2   Sotomayor, you're certainly right that the Court doesn't  
3   announce decisions that are good for one case only and  
4   leave every other question unresolved, the Court also --  
5   the Court also does proceed incrementally and it doesn't  
6   feel disabled from announcing the right rule in the case  
7   before it simply because it can foresee both that  
8   difficult cases will arise in the future and that the  
9   rule it's announcing won't clearly revolve --

10           JUSTICE SCALIA:           You have very long  
11   sentences, so it's very hard not to interrupt you. I --  
12   I don't agree with your first point. I don't see that  
13   there's an immense difference between establishing  
14   the -- the standards for a profession and excluding an  
15   individual from the profession. My goodness. What --  
16   what is a more obvious restriction of competition than  
17   preventing somebody from competing? I -- I don't see  
18   how you draw that line. Well, it's one thing to say  
19   that so-and-so can't practice, but it's another thing  
20   to -- to say that tooth whitening is -- is part of the  
21   practice. It seems to me they both involve  
22   anticompetitive decisions.

23           MR. STEWART:           They -- they involve  
24   anticompetitive decisions and they involve -- they  
25   require the State to tap into expertise. That is, the

1    basic decision to prohibit unlicensed individuals from  
2    removing stains or accretions from teeth was made by the  
3    North Carolina legislature back many decades ago.  
4    Obviously, the North Carolina legislature is not an  
5    expert body, it's not composed of dentists, but  
6    presumably they got input from the dental profession and  
7    they -- they tapped into the relative expertise for  
8    purposes of making their decision.

9            The determination, once the statutory  
10   structure has been established, the determination  
11   whether teeth whitening falls within one of the  
12   enumerated categories is not really establishing the  
13   standards. It is interpreting the existing standards.  
14   And that does require some interstitial discretionary  
15   decision-making. And our point, as -- as Justice Kagan  
16   was alluding to earlier, is we want those interstitial  
17   decisions to be made by disinterested persons or at  
18   least, if they're not made by disinterested persons, we  
19   don't feel confident that they truly reflect the policy  
20   choices of the State legislature itself.

21            JUSTICE ALITO:            What would happen if the  
22   North Carolina courts were to decide tomorrow that  
23   whitening is the practice of dentistry under this old  
24   statute?

25            MR. STEWART:            If the North Carolina -- I

1 mean, to make the case clearest, if the North Carolina  
2 Supreme Court held as an authoritative construction of  
3 State law, I mean, that would basically be the end of  
4 it. There could still be potential arguments that the  
5 mode of enforcement had anticompetitive consequences  
6 that went beyond the basic prohibition. But -- but for  
7 all intents and purposes, just as if the North Carolina  
8 legislature had specified that non-dentists cannot  
9 lawfully perform teeth whitening, that policy choice  
10 would not be subject to second-guessing by the FTC or a  
11 Federal antitrust court.

12 Similarly, if the North Carolina Supreme  
13 Court said, we construe the existing statute to have  
14 that meaning, that determination also wouldn't be  
15 subject to review by an antitrust court. And  
16 there's been a lot of --

17 JUSTICE ALITO: Just to follow up on that.  
18 So was the FTC decision predicated on the proposition  
19 that this was not -- whitening teeth was not within this  
20 old statute?

21 MR. STEWART: It was -- the FTC specifically  
22 declined to announce a decision one way or the other;  
23 that is, the complaint counsel in prosecuting the case  
24 before the commission offered reasons to believe that  
25 teeth whitening was not covered by this provision. And



1 basically, there were two reasons. The first is that  
2 scientifically, teeth whitening does not result in the  
3 removal of stains or accretions. The staining material  
4 remains in the enamel. It's simply bleached so that the  
5 discoloration is less and it's not so evident.

6 The second type of evidence that complaint  
7 counsel offered was that, back when the statute was  
8 passed, the methods of removing stains and accretions  
9 that would have been familiar to the legislature  
10 involved scraping, chipping, to some extent electronic  
11 instruments. It was the type of procedure that could  
12 not safely be done by people who lacked expertise.

13 JUSTICE ALITO: Well, you know, last week we  
14 had a case in which the North Carolina Court of Appeals  
15 held that an old motor vehicle statute required only one  
16 brake light rather than two brake lights. So it doesn't  
17 seem that an interpretation of this statute to cover  
18 whitening would be completely out of the question.

19 MR. STEWART: We agree. And as I say, the  
20 commission specifically declined to announce a decision  
21 one way or the other as to what was the correct reading  
22 of North Carolina law.

23 JUSTICE GINSBURG: I thought they agreed to  
24 the stipulation that this was an articulated State  
25 policy, and the question was must there be in addition

1 supervision. But you -- you've conceded for purposes of  
2 this argument the articulated State policy, didn't you?

3 MR. STEWART: Well, we conceded -- the  
4 commission assumed arguendo that there was a clearly  
5 articulated State policy. But if, for instance, rather  
6 than having the dental board composed of dentists, they  
7 were composed of disinterested bureaucrats who would  
8 hear from dentists but would make their own  
9 determination. The clear articulation requirement would  
10 be satisfied because clear articulation can be satisfied  
11 by something phrased at a relatively high level of  
12 generality. And so --

13 JUSTICE KENNEDY: If the consequences of a  
14 decision in your favor were that no professionals or  
15 representative of any occupation would ever serve on a  
16 government board where there's any chance of antitrust  
17 liability, would that, in your view, advance the  
18 purposes of the antitrust laws?

19 MR. STEWART: I mean, if we thought that  
20 were the consequence of the Court's decision, then we  
21 would be very leery of urging this result. But we see  
22 in cases like Goldfarb that the Virginia bar, for  
23 instance, was held to be susceptible to suit under the  
24 antitrust laws and could not invoke the State action  
25 immunity because it was out ahead of the Virginia

1 Supreme Court, and that hasn't had the effect of  
2 inducing members of the bar en masse to refrain from bar  
3 association activities.

4 Just to finish my answer to Justice  
5 Ginsburg, even if the statute is phrased at a relatively  
6 high level of generality that leaves some interstitial  
7 questions unresolved, it can still satisfy clear  
8 articulation. So if we had a body of disinterested  
9 bureaucrats who said we interpret the phrase "removal of  
10 stains and accretions" to include teeth whitening, we'd  
11 have clear articulation in the statute even though it  
12 didn't resolve every question. And then we would have a  
13 determination made by a body that would not require  
14 active supervision and that would be good enough. That  
15 would satisfy the prerequisites to State action immunity  
16 as this Court has articulated.

17 If I could, I'd like to make two -- two  
18 additional points. The first is that there was a fair  
19 amount of talk in the first part of the argument about  
20 the oath. The oath is at North Carolina General Statute  
21 11-7, and basically, the members of the board, like --  
22 like people who are designated State officials  
23 generally, will take an oath to support the  
24 Constitutions of North Carolina and the United States  
25 and to essentially be loyal to the State of North

1 Carolina.

2 It's essentially a State law version of the  
3 oath that new members of this Court's bar take in --  
4 take when they're sworn, as was done this morning. I  
5 believe the members -- I know the members of the bar  
6 swear to support the Constitution of the United States.  
7 I believe that they also swear to faithfully execute  
8 their duties as officers of the Court and members of the  
9 bar of this Court.

10 But when private counsel take that oath, no  
11 one imagines that they lose their private character, and  
12 in particular, nobody construes that oath as a promise  
13 by private counsel that he will place the interests of  
14 the general public ahead of the interests of his  
15 clients. Everybody understands that vigorous  
16 representation of a particular constituency may be  
17 consistent with --

18 JUSTICE SCALIA: That's because what they're  
19 promising to do is to serve as faithful private counsel.  
20 If they were being sworn in to an agency and promise to  
21 execute their duties in accordance with law, it would be  
22 quite different. And that's what's happening here.

23 MR. STEWART: There's nothing in the oath  
24 that requires them to place the interests of the public  
25 on a par with the interests of the dental community.

1 And everything about their selection -- the fact that  
2 they are required to be dentists, the fact that they are  
3 selected by other dentists -- reinforces the sense that  
4 they are expected to treat the dental community as their  
5 constituency.

6 And the last thing I'd say is a lot of the  
7 debate in areas like this centers on the idea of the  
8 profession regulating itself; neurologists regulating  
9 neurologists, dentists regulating dentists. A lot of  
10 what the board does is dentists regulation -- regulating  
11 dentists. But this case is not about that. This case  
12 is about dentists regulating non-dentists and, in  
13 particular, dentists telling dentists -- telling  
14 non-dentists in what endeavors can you legally compete  
15 with dentists. And so the concerns that underlie the  
16 Sherman Act with unfair restrictions on competition are  
17 at their zenith in a case like this one. Thank you.

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.

19 Mr. Mooppan, you have 4 minutes remaining.

20 REBUTTAL ARGUMENT OF HASHIM M. MOOPPAN

21 ON BEHALF OF PETITIONER

22 MR. MOOPPAN: I'd like to begin with Justice  
23 Breyer's question. The ultimate question in this case  
24 is how to balance a cost-benefit question.

25 There are benefits from having experts, and

1     there are risks from having experts be regulators, and  
2     the question is who should make the decision of how to  
3     weigh those costs and balance those risks. And what the  
4     government is arguing is that the Federal antitrust laws  
5     second-guess the State's decision about how to balance  
6     that risk.

7             The States have decided that the better way  
8     to handle the situation where you have experts like  
9     neurologists is to have some level of supervision, but  
10    not the level of active supervision that is required for  
11    private parties.

12            JUSTICE BREYER:            Why not simply say that the  
13    supervisor, be it the Court or be it the commission,  
14    must, when it decides the lawfulness of the agency's  
15    action or the private board's action, take into account  
16    the risks of self-dealing as well as the State policy  
17    that favors them making this decision, and where the  
18    consequence is an unreasonable weighing, it is unlawful  
19    under State law.

20            Now, that way you bring in an anti-trust  
21    element, it would comport with Midcal, you would be  
22    guarding against self-dealing without interfering  
23    tremendously with the state.

24            MR. MOOPPAN:            Well, for two reasons. First,  
25    Your Honor, because the states are allowed to act

1 anti-competitively. The states don't have to make a  
2 balance between anti-competitive benefits and public  
3 benefits. The states can unabashedly act competitively  
4 if they wish.

5 It would also be extremely complicated  
6 because what you would essentially have are two  
7 different versions of active supervision. One standard  
8 of active supervision that applies to private parties  
9 and one standard of active supervision that applies to  
10 public officials who also have private interests.

11 That's the reason why Mr. Stewart wouldn't  
12 answer your question by saying any of those things would  
13 work because they will never say that that stuff works  
14 for purely private parties. They will never say that  
15 just near --

16 JUSTICE KAGAN: Excuse me. I'm sorry.

17 MR. MOOPPAN: I was just going to say they  
18 would never say that the mere ability to have some level  
19 of review is good enough for private parties because  
20 even they recognize there is a fundamental difference  
21 between a private party and a public official who also  
22 has private interests.

23 JUSTICE KAGAN: Mr. Mooppan, the active  
24 supervision requirement has been around a long time and  
25 it varies case by case and state by state. There are a

1 wide, wide, wide variety of mechanisms that might  
2 satisfy the active supervision prong in a particular  
3 state with respect to a particular kind of activity.

4 But what you are suggesting is that that  
5 prong be simply removed from the analysis, that it be  
6 utterly irrelevant, that there is no supervision at all,  
7 and that's a very different and much more dramatic  
8 thing.

9 MR. MOOPPAN: Well, what I'm suggesting is  
10 twofold. First, the act of supervision is a fairly  
11 rigorous standard and I am sure the FTC would have told  
12 you that if you had asked them that question precisely.  
13 And I'm saying that it -- the issue here isn't whether  
14 these people will be unsupervised. The question is who  
15 will determine what level of supervision. And the  
16 question is whether the state should decide that a lower  
17 level of supervision is the appropriate one, balancing  
18 expertise versus the risk of conflicts of interests.  
19 And especially when you're dealing with supervision of  
20 market participants. There is a grave risk that if you  
21 require too much supervision as a condition of  
22 anti-trust immunity, no one will serve on these boards.

23 Mr. Stewart said he would be leery of  
24 advocating this position if we would have a high  
25 deterrence effect. Well, there is an amicus brief from



1 the ADA and the AMA and from 23 states, all of whom  
2 express grave concern that if you require supervision  
3 market participants will not serve on these boards, and  
4 that is the sort of concern this Court has recognized in  
5 cases like Hoover v. Romlin.

6 It is fundamentally up to the state to  
7 determine how to bear this risk. Whether they want to  
8 say that the benefits of expertise outweigh the risks of  
9 conflicts of interest. That is what this Court held in  
10 cases like Omni, that the Sherman Act is not intended to  
11 serve as some general rule of good government. It is up  
12 to the state to determine how they want to regulate  
13 sovereigns.

14 The final point I would like to make is  
15 about Justice Alito's question about what would happen  
16 if the State Supreme Court tomorrow said that teeth  
17 whitening was the practice of dentistry. I'm not quite  
18 sure I understood Mr. Stewart's position but the holding  
19 below is that active supervision is required regardless  
20 of whether there is clear articulation, so I would think  
21 that there would be liability regardless of what  
22 the Court did in the future.

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.

24 The case is submitted.

25 (Whereupon, at 12:06 p.m., the case in the

1     above-entitled matter was submitted.)  
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